No. 04-1121

Supreme Court, U.S.
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In The
Supreme Court of the United States

THORNBURY NOBLE, LTD.,

Petitioner,

v.

THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the Members of the Board of Supervisors in their Official Capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON and ROBERT A. MacDONNELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS THORNBURY TOWNSHIP BOARD OF SUPERVISORS, PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON AND ROBERT A. MacDONNELL

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether the Third Circuit, in harmony with all other Circuit Courts that have ruled on the issue, properly held that Respondents' conduct did not "shock the conscience" in a constitutional sense after the Township denied the deficient land development application of a developer, in furtherance of legitimate municipal goals.

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COUNTER-STATEMENT OF THE CASE

Respondent Thornbury Township is a Township of the Second Class, duly organized under the Pennsylvania Second Class Township Code, 53 P.S. § 65101 *et seq*. The Township is governed by an elected five-member Board of Supervisors, which is responsible, *inter alia*, for enacting and amending zoning ordinances, making final decisions on land development plans in the Township, and for rendering decisions on applications for conditional uses in certain zoning matters.

At all times relevant to this dispute, Petitioner owned approximately ten acres of land located at the intersection of Routes 202 and 926 in Thornbury Township, Chester County, Pennsylvania. Petitioner purchased the property in the mid-1980's, as separate four-acre and six-acre tracts. At the time, the four-acre tract was zoned for commercial use, while the larger, six-acre tract was zoned for agricultural/residential use. In the late 1980's, nearly three acres of the six-acre tract were rezoned for commercial use at the request of Petitioner, in order that it could develop a complex of ten office buildings on the land. After only one of the buildings was built, Petitioner let the remainder of the project lay dormant for years.

Petitioner then chose to abandon the ten building office complex plan to instead develop the property as an L-shaped retail center. Petitioner submitted a new land development plan for the retail center in accordance with the Municipalities Planning Code ("MPC") and the Township's Subdivision and Land Development Ordinance ("SALDO"). On October 5, 1993, the Township approved

the new land development plan.[1] Thereafter, the Board of Supervisors granted Petitioner's repeated requests for extensions to record the plans, and, on March 7, 1995, the Board ratified the final plans to permit Petitioner to develop the retail center pursuant to the L-shaped design.

In December 1997, Petitioner once again changed course. Petitioner chose to do so after failing to secure potential tenants for its L-shaped development, and after receiving letters of interest from two grocery chains who wished Petitioner to develop the property as a 50,000 to 55,000 square foot box shaped supermarket. Given this interest, Petitioner entered into a non-binding proposal

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[1] A brief description of the land development process under Pennsylvania law is pertinent for an analysis of the present matter. Under the Pennsylvania Second Class Township/Municipalities Planning Code, a developer can initiate the land development process by submitting a "sketch plan" to the Township. Petitioner's App. 135. A "sketch plan" is an informal draft of the plan to be proposed, which is voluntarily submitted by a developer to engage the Township in informal discussions as to the plans. Petitioner's App. 135. The sketch plan "does not constitute submission of an application for approval of a subdivision or land development plan." Petitioner's App. 135. In order to start the formal review process, the developer submits a "preliminary plan," which sets forth in detail all required data for the development. Petitioner's App. 136. Once a preliminary plan is submitted by a developer, the Township reviews the plans and provides the developer with a list of the defects that must be addressed for preliminary plan approval pursuant to the Municipalities Planning Code and Subdivision and Land Development Ordinance. Petitioner's App. 138-39. After the developer makes all necessary revisions, or alternatively, when the developer believes its preliminary plans to be complete, the Township will vote to accept or reject the preliminary plans. Petitioner's App. 138-39. If the developer believes that a municipality improperly rejected its plan after any vote, the developer has the right to appeal that decision to the Pennsylvania Court of Common Pleas. Thereafter, a land developer must then submit final plans for further review and approval by the Township. Petitioner's App. 142.

with one of the grocery chains, Genuardi's, on December 5, 1997. In this non-binding proposal, Petitioner and Genuardi's agreed that Petitioner would attempt to secure a zoning change within twelve months of the date of the proposal. The zoning change was to be sought by Petitioner because it desired to re-locate the building closer to the rear property line (i.e., closer to the residential district). Petitioner's proposed relocation would require two acres of land to be rezoned from residential to commercial, thereby eliminating any buffer zone between nearby residences and the proposed supermarket. It merits emphasis that both Courts below noted that Petitioner could have built the box-shaped building on the portion of its property then zoned for commercial use, but instead sought to shift its development on to the land zoned for residential use. Petitioner's stated basis for this encroachment was to improve access to the supermarket.

Petitioner presented a sketch plan of the proposed box-shaped supermarket on December 16, 1997. This sketch plan laid out a 50,000 to 55,000 square foot box shaped supermarket in lieu of the previously approved L-shaped building plans. When Petitioner inquired about the prospect of rezoning the two acres of land, the Board advised that it would like to review the plans before discussing zoning relief.

In early 1998, Petitioner complicated matters by appointing a new individual to head its development of the subject property. This individual was inexperienced in land development projects and proceeded under the mistaken belief that all necessary approvals were in place (i.e., under the mistaken belief that Petitioner had obtained final plan approval for its box-shaped design). Petitioner took no further action until July 7, 1998, when

it presented a different sketch plan to the Board, calling for a 50,000 square foot grocery store and a 10,000 square foot drug store in lieu of the L-shaped retail center.

At the July 7, 1998, Township meeting, Petitioner again raised the issue of rezoning a portion of the subject property from agricultural/residential to commercial. During these discussions, one of the Supervisors inquired as to whether Petitioner had any interest in helping the Township with an open space contribution to compensate for the loss of residential zoning. Petitioner responded that it would consider an open space contribution only if it was required to do so by the Township Ordinances. As any open space contribution was voluntary, Petitioner was not required to provide it, and, indeed, chose not to do so. The meeting was concluded with no decision as to rezoning having been made.

At the next public Township meeting on August 4, 1998, Petitioner provided no additional information in support of its need for rezoning and presented no preliminary plan. Shortly thereafter, in October 1998, Genuardi's withdrew its letter of interest, and Petitioner began discussions with the other large grocery chain, SuperFresh, about the prospect of building a box-shaped grocery market. Pursuant to the nonbinding agreement entered into between SuperFresh and Petitioner, SuperFresh was responsible for securing all government approvals.

On October 6, 1998, Petitioner submitted a document labeled "Application for Amended Final Plan Approval or, in the alternative, for a Zoning Map Amendment." This submission included two hand-drawn **sketch plans** of a proposed big box supermarket in place of the approved L-shaped strip retail center. The first sketch plan depicted a

proposed big box supermarket wholly within the commercially zoned tract. The second sketch plan depicted a proposed supermarket partially on the nearby residential property, which would require rezoning approximately two acres of this agricultural/residential tract. The October 6, 1998, submission, however, did not constitute a formal application for land use approval since the sketch plan did not include the **required** fully engineered preliminary plan. The Township's Solicitor advised the Township that was a *new* plan, presented as a sketch only, and therefore the Board was not obligated to take any action until a preliminary plan was filed. Moreover, the Township engineer reviewed Petitioner's submissions and determined, *inter alia*, that both sketch plans required numerous revisions in order to comply with the Township Zoning Ordinance.

The sketch plans were discussed at the Township Planning Commission on October 14, 1998. Petitioner advised the Commission that its purpose for attending this meeting and the Board meeting in November 1998 was to see if the Board would rezone the tract. The Township engineer offered his comments at the meeting, and the Planning Commission members asked Petitioner's counsel to submit a plan combining certain aspects of both sketch plans. However, no such plan was ever presented to the Township. One of the Supervisors stated that the Board was not in favor of rezoning the property, which had previously been rezoned for expanded commercial use. Petitioner was again advised that it must go through the proper land development process. Petitioner ignored this advice.

Meanwhile, another developer, R.J. Waters & Associates, sought to develop a large supermarket on its own property in Thornbury Township. R.J. Waters applied for and received approval for its development in properly submitting its preliminary and final development plans to the Board in accordance with the well-established land development process. In addition, Waters agreed to contribute $600,000 to the Township for the express purpose of purchasing additional open space, since Waters' development project would reduce existing open space in the Township.

Before the end of March 1999, Petitioner decided to build the L-shaped strip mall as previously approved. On April 7, 1999, Petitioner filed an application for a building permit to construct the L-shaped retail strip center. The Township issued the permit, and Petitioner built out the L-shaped strip mall, which is open and operating today.

The District Court for the Eastern District of Pennsylvania initially dismissed the Section 1983 claims against the individual Defendants in their official capacities, but, in utilizing an "improper motives" analysis, otherwise denied summary judgment with respect to Petitioner's substantive due process claim. Respondents renewed their Motions for Summary Judgment after the Third Circuit issued its decision in *United Artists, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003), in which the Third Circuit abrogated the use of the "improper motives" analysis in favor of the "shocks the conscience" test in a land use setting. The District Court held that the actions of Respondents did not satisfy the "shocks the conscience" standard, and dismissed Petitioner's remaining claims. The United States Court of Appeals for the

Third Circuit agreed and affirmed the District Court's decision. Petitioner sought an *en banc* rehearing before the Third Circuit, which was denied. The instant Petition for Writ of Certiorari followed.

SUMMARY OF THE ARGUMENT

When the Third Circuit decided the case of *United Artists, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003), it brought the Third Circuit into harmony with all other Circuit Courts that have ruled on the issue of the appropriate standard to apply in land use disputes when a developer asserts a Section 1983 civil rights claim based upon an alleged deprivation of substantive due process under the Fourteenth Amendment to the U.S. Constitution. Both the Trial Court and the Third Circuit properly applied the "shocks the conscience" standard when they determined that the undisputed facts of record warrant summary judgment in favor of the individual Township Supervisors and the Township. Indeed, there is no circuit split as to this issue, and the adoption of the "shocks the conscience" standard comports with existing Supreme Court precedent.

There is no need for further "definitional analysis" to allow the Circuit Courts of this land to decide substantive due process claims in land disputes. The Circuit Courts have appropriately applied the "shocks the conscience" standard to prevent run-of-the-mill zoning disputes from being transformed into Federal Constitutional causes of action. Indeed, the actions of the Supervisors in the case at bar fall within the "environment of land use planning," an area of state law in which the federal courts do not

interfere in the absence of a violation of a constitutionally protected right.

Moreover, Petitioner grossly mischaracterizes the nature of the voluntary open space contribution made by another developer. Respondents did not engage in any violation of state law, and neither of the lower courts have so determined. The evidence of record does not support Petitioner's characterization, nor does it support that a voluntary contribution equates to a "zoning for sale." Neither of the lower courts have so held.

Lastly, to the extent that Petitioner claims that its alternative development plan should have been approved, their claim is not ripe. Petitioner never obtained the necessary preliminary or final plan approvals for its proposed development. Accordingly, the instant Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

1. The "shocks the conscience" standard provides a sufficient basis for Circuit Courts to decide substantive due process claims in land use matters.

While Petitioner argues that there is a need for this Court "to provide a cogent definitional analysis" of the standard to be employed in substantive due process claims, the argument fails for two equally compelling reasons. First, the Circuit Courts have applied the "shocks the conscience" standard in land use cases for decades. *See, e.g., Pearson v. City of Grant Blanc*, 961 F.2d 1211 (6th Cir. 1992); *Southern Pacific Transportation Co. v. Los Angeles*, 922 F.2d 498 (9th Cir. 1990); *Cloutier v. Town of*

Epping, 714 F.2d 1184, 1189 (1st Cir. 1983). The Circuit Courts have been able to reach their decisions throughout the years without the "cogent definitional analysis" that Petitioner believes is so sorely needed in this area of the law. Petitioner's claim that a cogent definitional analysis is needed is belied by the established history of the lower courts ably reviewing substantive due process claims in land use matters. Conspicuous by its absence is any citation to a Circuit Court decision that cries out for greater guidance.

Second, Petitioner's argument fails given that this Court adopted the "shocks the conscience" standard knowing full well that it is not a precise standard. *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) ("[t]he measure of what is conscience shocking is no calibrated yard stick."). Rather, the standard must be applied to each case independently. *Id.* at 850. The Court has provided sufficient guidance as to how the lower courts should apply the "shocks the conscience" standard, as set forth below. Petitioner would have this Court reverse the decades-old case-specific application of the "shocks the conscience" standard, and replace it with a formulaic, one-size-fits-all definition. Moreover, Petitioner so argues without providing any hint as to what new analysis would be applied.[2] The "shocks the conscience" standard does not

[2] Petitioner's citations to *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), are inapposite. Neither of those decisions involved substantive due process challenges, and indeed, explicitly rejected the notion that those decisions would apply to substantive due process claims. *Nollan*, 483 U.S. at 836 n.4 ("[T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process

(Continued on following page)

need a new definitional analysis, and Petitioner's request must be denied.

2. The Third Circuit's "shocks the conscience" analysis comports with Supreme Court Precedent and does not conflict with the decision of any other Court.

The decisions by the Courts below do not conflict with any decision of this Court, any Court of Appeals, or any other Court in the United States. Application of the "shocks the conscience" standard as addressed by the court below developed out of this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

In applying the "shocks the conscience" standard espoused in *Lewis*, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id.* at 845-46. The Due Process Clause is violated by executive action only when it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. *Id.* at 845-46 (citation omitted). *See also Fagan v. City of Vineland*, 22 F.3d 1296, 1303 (3d Cir. 1994) (*en banc*) ("[T]he substantive component of the Due Process Clause can only be violated by governmental employees when their conduct amounts to an abuse of official power that 'shocks the conscience.'").

Subsequent to the *Lewis* decision, the Third Circuit issued its ruling in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003), in

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challenges, and equal protection challenges are identical."). *See also Dolan*, 512 U.S. at 384 n.5.

which it held that the "shocks the conscience" standard applies in cases involving substantive due process challenges to municipal land use decisions. The *United Artists* decision brought the Third Circuit in line with other Circuit Courts that have addressed the issue. *Id.* at 402. *See, e.g., Conroe Creosoting Co. v. Montgomery County, Texas*, 249 F.3d 337 (5th Cir. 2001) ("Where a state official deprives a corporation of its property in a manner that 'shocks the conscience,' substantive due process may be violated."); *Pearson v. City of Grant Blanc*, 961 F.2d 1211 (6th Cir. 1992) (only actions which "shock the conscience" may violate substantive due process); *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104-05 (8th Cir. 1992) (holding that allegations that the city arbitrarily applied a zoning ordinance were insufficient to state a substantive due process claim, and stating that the "decision would be the same even if the City had knowingly enforced the invalid zoning ordinance in bad faith .... A bad-faith violation of state law remains only a violation of state law."); *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 32 (1st Cir. 1991) ("Even assuming that ARPE engaged in delaying tactics and refused to issue permits for the [development] project based on considerations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations of the federal constitution under a substantive due process label."); *Southern Pacific Transportation Co. v. Los Angeles*, 922 F.2d 498 (9th Cir. 1990) (Ninth Circuit will subject local zoning decisions to substantive due process review, but the scope of review is that for legislation, even as to an individual property owner's claim, and any relationship to a proper zoning goal, such as prevention of traffic congestion, will be sufficient); *Cloutier v. Town of Epping*, 714 F.2d 1184, 1189 (1st Cir. 1983) (holding that

substantive due process is not violated by local zoning even when accompanied by claims of purposeful malicious obstruction of a landowner's rights, that included alleged abuse of process, perjury, failing to come forward with material evidence, and giving false information to a state agency about the plaintiffs).

In applying this standard in the land development context, the conduct of township officials in denying a land development plan fails to shock the conscience (even if motivated by personal animus) when there exists a rational basis for a land use decision for the denial. *See Sameric Corp. of Delaware v. City of Philadelphia*, 142 F.2d 582, 595-96 (3d Cir. 1998) (only relevant inquiry in the review of a land use decision made by a local government agency was whether the decision was rationally related to land use planning); *Bituminous Materials, Inc. v. Rice County*, 126 F.2d 1068, 1070-71 (8th Cir. 1997); *Kantner v. Martin County*, 929 F. Supp. 1482 (S.D. Fla. 1996). *See also Cornneal v. Jackson Township*, 2004 WL 790315, at *2 (3d Cir. April 13, 2004).

In the present matter, both the Third Circuit and the District Court held that none of the actions taken by the municipal officials shocked the conscience. Indeed, the record unquestionably supports those holdings below. Petitioner inappropriately attacks these decisions on two grounds: 1) that actions of the Township officials constituted a violation of state law in violation of their rights to substantive due process; and 2) that the federal courts should not have given deference to the conduct of local municipalities in applying the "shocks the conscience" standard to the instant matter.

i) Acceptance of the voluntary open space contribution did not constitute a violation of state law and is not sufficient to "shock one's conscience."

Petitioner has grossly mischaracterized the voluntary open space contribution as a violation of state law. None of the evidence proffered through discovery supports this position, and neither the Third Circuit nor the District Court so determined. As to this issue, the Third Circuit determined that "the most nefarious interpretation of the events that transpired before the Board would be that the Board privileged Water's zoning request over Noble's in exchange for Water's $600,000 contribution to the Township for the purchase of open space." *Thornbury Noble*, 112 Fed. Appx. 185, 188 (3d Cir. Oct. 18, 2004). The Third Circuit aptly noted that such "actions of the Board would still not rise to the level of shocking the conscience because it is well settled that the preservation of open space is a legitimate municipal goal." *Id.*, *citing Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980), *overruled on other grounds by First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987). No state or federal court has ever held that a municipality is barred from requesting that a developer voluntarily help reduce the impact of commercial development as part of the process of rezoning land from residential/agricultural to commercial. It thus merits emphasis that the Third Circuit did *not* determine that acceptance of the voluntary open space contribution from Waters was a bribe or was otherwise in violation of state law.

More to the point, the claim that the Township violated state law by engaging in "contract zoning" with R.J.

Waters is a red herring. Petitioner cannot demonstrate a violation of *its* substantive due process rights by alleging an unlawful transaction between the Township and some other developer concerning an entirely different property. Petitioner improperly attempts to fuse concepts of equal protection (which is not at issue before this Court) with the substantive due process analysis.[3]

It is interesting that Petitioner complains about the "Waters deal," when the record contains no evidence that Waters was the victim of "unlawful extortion." The record is devoid of any suggestion that the contribution by Waters to preserve open space was anything but voluntary and proper. If Petitioner truly believed that the Waters' approvals were improper, Petitioner could have availed itself of the appeal procedures available under the Municipalities Planning Code. *See, e.g.*, 53 P.S. § 101006-A "Judicial Relief (a) In a land use appeal, the court shall have the power to . . . set aside or modify any action, decision or order of the governing body. . . ." 53 P.S. § 101006-A.

The concept of contractually conditioned zoning was addressed by the Pennsylvania Supreme Court in *Carlino v. Whitpain Investors*, 499 Pa. 498, 453 A.2d 1385 (1982), where the Court held that agreements between a municipality and a landowner that *restrict* the use of rezoned property are unenforceable. *Id.* at 1388. Importantly, the Court distinguished the facts presented in *Gladwyne Colony, Inc. v. Lower Merion Township*, 409 Pa. 441, 187

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[3] Petitioner never pursued an equal protection claim in this matter. Nevertheless, had Petitioner preserved the issue of whether a viable equal protection claim exists, the record is devoid of evidence that R.J. Waters was similarly situated or that the Township lacked a rational basis for treating Petitioner differently than R.J. Waters.

A.2d 549 (1963), where the Court *upheld* an agreement between a municipality and a landowner whereby the landowner gave consideration (parkland) to the municipality in exchange for rezoning.

In the instant case, Petitioner's contract zoning theory is flawed for the same reasons stated by the Pennsylvania Supreme Court in *Gladwyne*, since Petitioner does not allege, nor does the record reflect, that the amended zoning ordinance is arbitrary or unreasonably discriminatory or without substantial relation to the public health, safety and welfare.[4] Petitioner's claim of contract zoning is unsupported and falls of its own weight.

Moreover, Petitioner has cited no caselaw to support that there is any circuit split or other unresolved issue of federal law as to whether an alleged violation of state law can satisfy the "shocks the conscience" standard. The Circuit Courts are in agreement as to this issue, which further comports with Supreme Court precedent. "As has been often stated, '(t)he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution.'" *Estabrook*, 680 F.2d at 833, *citing Crocker v. Hakes*, 616 F.2d 237, 239 n.2 (5th Cir. 1980) (per curiam). *See also Paul v. Davis*, 424 U.S. 693, 700, 96 S. Ct. 1155, 1160, 47 L. Ed. 2d 405 (1976), *quoting Screws v. United States*, 325 U.S. 91, 108-09, 65 S. Ct. 1031, 1038, 89 L. Ed. 1495 (1945) ("Violation of local law does not necessarily mean that federal rights have been invaded."); *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S. Ct. 397, 401, 88

[4] It should be noted that an amendment to the zoning ordinance is presumptively valid and that the burden rests heavily upon the Petitioner to demonstrate that the amendment is unconstitutional. *Milk Control Commission v. Battista*, 413 Pa. 652, 198 A.2d 840 (1964).

L. Ed. 497 (1944) ("[N]ot every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another."). Accordingly, Petitioner's claim that the Township "sold" zoning to another developer in obtaining an open space preservation fee is neither a valid characterization of the record and the holdings below, nor is it a valid basis upon which to conclude that actions of Respondents shocked the conscience.

ii) The "shocks the conscience" standard appropriately reflects the wariness of the federal courts from intervening in local land use decisions.

The Third Circuit is also in agreement with all other Circuit Courts that have ruled on the issue as to the wariness of federal courts in adjudicating the rights and wrongs of local planning disputes. The *United Artists* Court noted that the federal courts should be cautious in adjudicating the rights and wrongs of local planning disputes. *United Artists*, 316 F.3d at 402, *citing Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982), and *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45-46 (1st Cir. 1992). The court explained that the "shocks the conscience" standard "prevents [Federal Courts] from being cast in the role of a "zoning board of appeals." *United Artists*, 316 F.3d at 402. "It is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983." *Id.* The courts have aptly noted that "every appeal by a disappointed developer from an adverse ruling

by a local planning authority involves some claim that the authority exceeded, abused, or distorted its legal authority in some manner. . . ." *Estabrook*, 680 F.2d at 833. *See also Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988) (Strong disapproval of federal courts' reviewing local zoning matters; any action by the local legislative body on a zoning matter is legislative, and thus non-reviewable.).

The inappropriateness of allowing every zoning dispute to transform into a federal Constitutional claim is further manifest in that there are adequate state law remedies to vindicate these claims without resort to a federal court. *See Parratt v. Taylor*, 451 U.S. 527, 542, 101 S. Ct. 1908, 1916, 68 L. Ed. 2d 420 (1981). *Cf. Kent Island Joint Venture v. Smith*, 452 F. Supp. 455 (D. Md. 1978) (district court abstaining in case where local officials approved allegedly "unreasonable" water and sewer rules in order to frustrate local developer). The reluctance of the federal courts to interfere with local land use decisions is further consistent with the absolute immunity afforded to local authorities in making zoning determinations. *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998).

Accordingly, the Third Circuit properly applied the "shocks the conscience" standard in the instant matter. Petitioner's Writ of Certiorari should not be granted in this matter given that there is no dispute between the Circuits as to this issue, and existing Supreme Court precedent supports the Third Circuit's ruling. Thus, Certiorari should be denied.

3. Petitioner's Claim is not ripe.

Review of the instant matter is further inappropriate as Petitioner's claim is not ripe. Following Petitioner's decision to abandon the approved office campus concept, Petitioner obtained final plan approval to construct the L-shaped retail center. Rather than complete this project, Petitioner attempted to again change course by proposing to construct entirely different buildings, i.e., a 50,000 square foot supermarket and a 10,000 square foot drug store. While Petitioner was certainly free to pursue this concept, Petitioner failed to submit properly engineered plans as required by the Pennsylvania Municipalities Planning Code and the Pennsylvania Subdivision and Land Development Ordinance. Rather, Petitioner only submitted sketch plans and nothing more. The identical error was committed by the plaintiff developer in *Marriott Senior Living Services, Inc. v. Springfield Township*, 78 F. Supp. 2d 376 (E.D. Pa. 1999). The *Marriott* Court held that plaintiff's Section 1983 claim was not ripe because the submission of *sketch plans* for a proposed land development under Pennsylvania law does not provide a municipality with an opportunity to review the plan in its preliminary or final form in accordance with the governing land use ordinances.[5]

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[5] The term "sketch plan" is conspicuously absent from Petitioner's brief. Petitioner refers only to its "application," which in reality was only a sketch plan. As stated *supra*, the Township is not required to take any official action on a sketch plan, and such does not satisfy the requirements of Pennsylvania law in regard to land developments. Petitioner presented no evidence below that refutes the findings of the Township Engineer, who identified a multitude of deficiencies with Petitioner's incomplete sketch plans.

In the absence of a final review or denial of appropriately submitted land development plans of Petitioner by the municipality, Petitioner's Section 1983 claim in the instant case is not ripe for adjudication. Here, Petitioner had failed to submit any preliminary plans for the box-shaped development proposal, and did so only in sketch format. It merits emphasis that the individual in Petitioner's business who took control of the project had no experience in the land development procedures and was under the mistaken belief that final approvals had been obtained. In reality, however, final approvals had only been obtained from the L-shaped development, not the box-shaped design. Accordingly, Petitioner was not entitled to any plan approvals and Petitioner's substantive due process claim is unripe. Thus, Petitioner's Petition for Writ of Certiorari should not be granted.

CONCLUSION

Petitioner's Writ of Certiorari should not be granted in this matter. The Circuit Courts have appropriately applied the "shocks the conscience" standard in land use cases for decades in congruence with Supreme Court precedent. Additionally, while Petitioner demands a more cogent standard, the necessity for such is obviated by this Court's acknowledgement that "shocks the conscience" is not a precise standard, but must be applied to each matter independently.

Moreover, the decision of the Third Circuit in the *Thornbury Noble* does not conflict with any other federal court decisions. Its conclusions as to the application of the "shocks the conscience" standard and the degree of conduct

sufficient to satisfy this standard are well established in other Circuit Courts and are supported by existing Supreme Court precedent. There is no circuit split as to this issue.

Also, Petitioner grossly mischaracterizes the nature of the voluntary open space contribution as being a violation of state law, when in fact neither of the Courts below has so held. Thus, the basis for Petitioner's claim on appeal (i.e., that the municipal officials engaged in conscience shocking conduct by violating state law) is not supported by the record and did not constitute the basis for the decisions below. Lastly, review of the instant matter is further inappropriate as Petitioner's claim is not ripe. Accordingly, the grant of Certiorari is not warranted in this matter.

Wherefore, for the above reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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